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11 UNITED STATES BANKRUPTCY COURT

12 NORTHERN DISTRICT OF CALIFORNIA

13 SAN JOSE DIVISION

14 In re  
15 DONALD CHARLES SCHWARTZ,  
16 Debtor.

17 Case No. 23-50372-MEH  
18 Chapter 13  
19 **MOTION FOR RELIEF FROM**  
20 **AUTOMATIC STAY**  
21 R.S. No. FW-001

22 Date: July 13, 2023  
23 Time: 2:30 p.m.  
24 Place: In Person or Via Zoom  
25 Courtroom 11  
26 280 South First Street  
27 San Jose, CA  
28 Judge: Hon. M. Elaine Hammond

29 NOAH SCHWARTZ, MARGO SCHWARTZ, individually and the SCHWARTZ  
30 FOUNDATION, a California corporation (collectively "**Schwartz**" or "**Movants**"), as plaintiffs  
31 and cross-defendants in that certain state court litigation entitled *Schwartz Foundation, a*  
32 *California corporation, et al. v. Donald C. Schwartz, et al.* pending in the Superior Court of the  
33 State of California, County of Santa Cruz, as Case No. 21CV00416 ("**State Court Action**"),  
34 hereby move this Court pursuant to 11 U.S.C. § 362(d) and Fed. R. Bankr. P. 4001(a) and Bankr.  
35 Local Rule 4001-1 for an order lifting the automatic stay arising in this case pursuant to 11 U.S.C.

1 § 362(a), as follows:

2 **I. STATEMENT OF FACTS**

3       1. On February 22, 2021, Movants commenced the State Court Action against Donald  
4 C. Schwartz (“**Debtor**”), Paul D Schwartz, Charles P. Schwartz, III, David Richard Schwartz, and  
5 Stevon S. Schwartz (collectively “**Defendants**”) by filing a Complaint for Relief Under  
6 Corporations Code Section 09, Including Declaratory and Injunctive Relief; a First Amended  
7 Complaint was filed on June 21, 2021 (the “**Complaint**”). (M. Schwartz Decl. ¶ 2, Ex. A (copy of  
8 the State Court Action first amended complaint).)<sup>1</sup>

9       2. In the State Court Action Movants seek declaratory relief, injunctive relief, and  
10 costs of suit, including, *inter alia*, a judicial declaration that Margot Schwartz and Noah Schwartz  
11 are the only two directors of the Schwartz Foundation, a permanent injunction precluding  
12 Defendants from acting as a director or officer of the Schwartz Foundation, and related relief. (M.  
13 Schwartz Decl. ¶¶ 2-3, Ex. A.) The only monetary relief sought is limited and arguably de  
14 minimis: costs of suit, including attorneys’ fees to the extent permitted by law. (M. Schwartz Decl.  
15 ¶¶ 2-3, Ex. A.) In addition, under a State Court order dated January 10, 2022, Movants have been  
16 awarded sanctions in the amount of \$4,500.00, and other sanctions are pending in the total sum of  
17 \$9,605.00. (See Claim Nos. 5-7, filed June 15, 2023.)

18       3. Defendants dispute Movants’ position and contend that Donald, Stevon, and  
19 Charles are the directors of the Schwartz Foundation, pursuant to that certain Order entered on  
20 January 12, 2021, in Case No. 21CV00032 (Superior Court of California, County of Santa Cruz)  
21 (“**Disputed Order**”); Movants contend that Debtor obtained entry of the Disputed Order by fraud.  
22 (M. Schwartz Decl. ¶¶ 2, 4, Ex. A.)

23       4. On March 24, 2021, the Court entered an Order giving Margo Schwartz and Noah  
24 Schwartz authority over the Schwartz Foundation, pending the outcome of the litigation (“**Status**  
25 **Quo Order**”). (M. Schwartz Decl. ¶ 5, Ex.B.)

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<sup>1</sup> All references to the Declaration of Margo Schwartz shall be referred to as (M. Schwartz Decl. ¶  
28 \_\_, Ex. \_\_).

1           5.     **The State Court Action has been set for trial multiple times:**

2           a.    The case was initially set for trial on **May 27, 2021** (M. Schwartz Decl. ¶  
3 6(a));

4           b.    The initial trial date was continued to **October 2021**, because Movants were  
5 unable to complete necessary discovery due to Donald Schwartz's conduct (M. Schwartz Decl. ¶  
6 6(b)). Movants were ultimately awarded sanctions against Defendants for Debtor's conduct in the  
7 amount of \$4,700.00 and other sanctions are pending in the total sum of \$9,605.00. (M. Schwartz  
8 Decl. ¶ 6(b).)

9           c.    After getting the initial trial date continued, in September 2021, Defendants  
10 inundated the Court with motions,<sup>2</sup> causing the court to postpone the trial date to **March 7, 2022**.  
11 (M. Schwartz Decl. ¶ 6(c).)

12           d.    On February 10, 2022, Defendant Michael Osterberg filed for bankruptcy  
13 (U.S. Bankr. E.D. Cal. Case No. 22-20304), which caused the Court to vacate the trial date. (M.  
14 Schwartz Decl. ¶ 6(d).) On February 28, 2022, Michel Osterberg's bankruptcy case was dismissed  
15 for failure to file a Chapter 13 plan, Schedules, and Statement of Financial Affairs. (U.S. Bankr.  
16 E.D. Cal. Case No. 22-20304, Docket No. 9; *see also* U.S. Bankr. E.D. Cal. Case No. 22-20304,  
17 Docket No. 7, filed Feb. 14, 2022 (Notice of Incomplete Filing and Notice of Intent to Dismiss  
18 Case).)

19           e.    The case was next set for trial on **April 24, 2023**, which was vacated when  
20 Debtor's Petition was filed. (M. Schwartz Decl. ¶ 6(e).)

21           6.     On **April 6, 2023**, Debtor filed a voluntary petition for relief under Chapter 13 of  
22 the Bankruptcy Code, and an Order for Relief was entered on that date. (Docket No. 1.)

23           7.     Debtor did not list the State Court Action in the Schedules or Statement of  
24 Financial Affairs. (*See* Docket No. 13, filed May 4, 2023.)

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<sup>2</sup> The motions included: three (3) separate demurrers attacking Complaint; a motion to set aside  
28 the Status Quo Order; a motion for sanctions against Movants; a motion for judgment on the  
pleadings; and a number of premature motions in limine. (M. Schwartz Decl. ¶ 6(c).)

1           8.     **The current status of the State Court Action is as follows:**

2           a.    Two (2) motions to compel Defendants to respond to written discovery  
3 were set for hearing on April 11, 2023 (M. Schwartz Decl. ¶ 9(a));

4           b.    Motion to compel the depositions of Defendants Michael Osterberg, David  
5 Schwartz, and Stevon Schwartz was set for hearing on April 11, 2023, (M. Schwartz Decl. ¶ 9(b));

6           c.    With relief from stay, the State Courts should be able to set the case for trial  
7 within a few months; however, the trial date will depend on the Court's calendar and the calendars  
8 of the parties and counsel. (M. Schwartz Decl. ¶ 9(c).) The case will be tried by the Court without  
9 a jury. (M. Schwartz Decl. ¶ 9(c).) Since the judge has already decided so many motions in the  
10 case and is very familiar with the parties' factual and legal positions, it is anticipated that he will  
11 make his decision pretty quickly after trial. (M. Schwartz Decl. ¶ 9(c).)

12       **II. MOTION**

13       **A. Relief from the Automatic Stay for Cause (11 U.S.C. § 362(d)(1))**

14       Section 362(d)(1) provides:

15       (d) On request of a party in interest and after notice and a hearing, the court shall  
16 grant relief from the stay provided under subsection (a) of this section, such as by  
terminating, annulling, modifying, or conditioning such stay –

17       (1) for cause, including the lack of adequate protection of an interest in property  
of such party in interest . . . .

18       11 U.S.C. § 362(d)(1). "What constitutes 'cause' for granting relief from the automatic stay is  
19 decided on a case-by-case basis." *Kronemyer v. Am. Contrs. Indem. Co. (In re Kronemyer)*, 405  
20 B.R. 915 (B.A.P. 9th Cir. 2009) (*citing Christensen v. Tucson Estates, Inc. (In re Tucson Estates,*  
21 *Inc.*), 912 F.2d 1162 (9th Cir. 1990)). "Among factors appropriate to consider in determining  
22 whether relief from the automatic stay should be granted to allow state court proceedings to  
23 continue are considerations of judicial economy and the expertise of the state court . . . as well as  
24 prejudice to the parties and whether exclusively bankruptcy issues are involved." *Kronemyer*, 405  
25 B.R. at 921 (*citations omitted*). The panel in *Kroneyer* also found that there are numerous other  
26 non-exclusive factors that can be taken into account when considering whether to grant relief from  
27 the automatic stay, including the "Curtis Factors" described in *In re Curtis*, 40 B.R. 795 (Bankr.  
28

1 D. Utah 1984). *Kronemyer*, 405 B.R. at 921. The *Curtis* Factors are:

- 2 1. Whether the relief will result in a partial or complete resolution of the issues; 2.
- 3 The lack of any connection with or interference with the bankruptcy case; 3.
- 4 Whether the foreign proceeding involves the debtor as a fiduciary; 4. Whether a
- 5 specialized tribunal has been established to hear the particular cause of action and
- 6 whether that tribunal has the expertise to hear such cases; 5. Whether the debtor's
- 7 insurance carrier has assumed full financial responsibility for defending the
- 8 litigation; 6. Whether the action essentially involves third parties, and the debtor
- 9 functions only as a bailee or conduit for the goods or proceeds in question; 7.
- 10 Whether the litigation in another forum would prejudice the interests of other
- 11 creditors, the creditors' committee and other interested parties; 8. Whether the
- 12 judgment claim arising from the foreign action is subject to equitable
- 13 subordination under Section 510(c); 9. Whether movant's success in the foreign
- 14 proceeding would result in a judicial lien avoidable by the debtor under Section
- 15 522(f); 10. The interests of judicial economy and the expeditious and economical
- 16 determination of litigation for the parties; 11. Whether the foreign proceedings
- 17 have progressed to the point where the parties are prepared for trial, and 12. The
- 18 impact of the stay on the parties and the "balance of hurt."

19  
20 *Trubro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311  
21 B.R.551, 559 (Bankr C.D. Cal. 2004) (*citing Curtis*, 40 B.R. at 799-800). Similarly, the Ninth  
22 Circuit describes non-exclusive abstention factors as:

- 23 (1) the effect or lack thereof on the efficient administration of the estate if a Court
- 24 recommends abstention, (2) the extent to which state law issues predominate over
- 25 bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4)
- 26 the presence of a related proceeding commenced in state court or other
- 27 nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §
- 28 1334, (6) the degree of relatedness or remoteness of the proceeding to the main
- 1 bankruptcy case, (7) the substance rather than form of an asserted "core"
- 2 proceeding, (8) the feasibility of severing state law claims from core bankruptcy
- 3 matters to allow judgments to be entered in state court with enforcement left to
- 4 the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the
- 5 likelihood that the commencement of the proceeding in bankruptcy court involves
- 6 forum shopping by one of the parties, (11) the existence of a right to a jury trial,
- 7 and (12) the presence in the proceeding of nondebtor parties.

8  
9 *Tucson Estates*, 912 F.2d at 1167.

10  
11 **B. Movants Are Entitled to Relief from the Automatic Stay for Cause (11 U.S.C.  
12 § 362(d)(1))**

13 Analysis of the applicable *Kronemyer*, *Tucson Estates*, and *Curtis* factors dictate that relief  
14 from the automatic stay is appropriate under the facts of this case, as follows:

1                   **1. State Court Action is Not Primarily a Core Proceeding**

2                  The causes of action at issue in the State Court Action do not affect any liability or asset of  
3 the Debtor or the estate and are not a core proceedings under 28 U.S.C. § 157(b)(2). In the State  
4 Court Action Movants primarily seek declaratory relief and injunctive relief, including, *inter alia*,  
5 a judicial declaration that Margot Schwartz and Noah Schwartz are the only two directors of the  
6 Schwartz Foundation and a permanent injunction precluding Defendants from acting as a director  
7 or officer of the Schwartz Foundation. (M. Schwartz Decl. ¶¶ 2-3, Ex. A.)

8                  Although costs of suit and discovery sanctions that have been or may in the future be  
9 awarded in the State Court Action may be deemed monetary claims that are core proceedings  
10 under 28 U.S.C. § 157(b)(2)(B), such awards are: limited and arguably de minimis, incident to the  
11 causes of action, and necessarily attendant to any form of litigation.<sup>3</sup> Movants propose that relief  
12 include limited authority to liquidate these monetary claims against the Debtor with the proviso  
13 that they may not enforce such awards without further order modifying the stay.

14                   **2. The State Court Action Lacks Connection with the Bankruptcy Case,  
15 Concerns Wholly State Law Issues, Relief will Result in a Complete  
16 Resolution of the Issues, and Allowing the State Court Action to  
17 Proceed Will Promote Judicial Economy**

18                  The State Court Action has been pending since February 2021, and it has been set for trial  
19 multiple times, and involves unrelated non-debtor parties. (*See, supra* § I(5).) All of the issues  
20 raised in the State Court Action are state law issues, and the State Court is familiar with those  
21 issues, the parties' positions, and the facts of the case, as it has already decided many motions in  
22 the case. (*See* M. Schwartz Decl. ¶¶ 2, 9(c), Ex. A (Complaint).) Delaying resolution of the State  
23 Court Action or requiring the parties to litigate in the Bankruptcy Court at this late stage would  
merely cause further delay and hinder judicial economy.

24                   **3. Movants Have Been and Will Continue To Be Prejudiced by Further  
25 Delay**

26                  Refusal to grant relief from the automatic stay will only cause further harm, delay, and

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27                  <sup>3</sup> Under a State Court order dated January 10, 2022, Movants have been awarded sanctions in the  
28 amount of \$4,500.00, and other sanctions are pending in the total sum of \$9,605.00. (*See* Claim  
Nos. 5-7, filed June 15, 2023.)

1 increased cost. (M. Schwartz Decl. ¶ 10.) Until the State Court Action is resolved, the Schwartz  
2 Foundation is in a holding pattern, unable to do the level of charitable work that is possible. (M.  
3 Schwartz Decl. ¶ 10.) In this state of limbo, Movants are hamstrung in their ability to run the  
4 Schwartz Foundation because their ability to make decisions is limited by the very real possibility  
5 that Debtor will dispute any decisions made by Movants through further litigation. (M. Schwartz  
6 Decl. ¶ 10.)

7       In addition, Debtor and the other Defendants have used the State Court Action as a vehicle  
8 to prevent the proper disposition of Schwartz Foundation assets, which has already resulted in  
9 financial harm to the Schwartz Foundation. (M. Schwartz Decl. ¶ 11.) Specifically, when trial was  
10 set for March of 2022, Defendants filed a motion to prevent Mechanics Bank (the Trustee of the  
11 Trust that holds assets benefiting the Schwartz Foundation) from moving forward with its  
12 recommendation to sell one of the apartment buildings that is in the Trust. (M. Schwartz Decl. ¶  
13 11.) The State Court granted Defendants' motion, despite evidence that precluding the sale of the  
14 building would cause financial harm to the Schwartz Foundation. (M. Schwartz Decl. ¶ 11.) The  
15 State Court's ruling was based in large part on the fact that the case was about to be tried (in March  
16 2022), so the State Court decided to preserve the status quo pending the outcome of trial, despite  
17 the financial harm to the Schwartz Foundation from having to refinance the loan instead of selling  
18 the building. (M. Schwartz Decl. ¶ 11.) If the State Court Action is not tried and decided soon, the  
19 same scenario could play out again in 2024, when the loan comes due on the other building that is  
20 held in the Trust, resulting in further damage to the Schwartz Foundation, especially in light of  
21 today's much higher interest rates. (M. Schwartz Decl. ¶ 11.)

22       Finally, the longer this case remains pending, and the more times the trial date is  
23 postponed, the more the fees and costs increase. (M. Schwartz Decl. ¶ 12.)

24           **C. Waiver of Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure.**

25       Movants request that this Court waive the effect of Rule 4001(a)(3) of the Federal Rules of  
26 Bankruptcy Procedure (**FRBP**).

27           **III. CONCLUSION**

28       For all the foregoing reasons, Movants respectfully request that this Court make and enter

1 an order for relief from the automatic stay:

- 2       1) Permitting Movants to prosecute the pending State Court Action for the limited purpose  
3 of obtaining the requested declaratory and injunctive relief, and to liquidate any sanctions claims  
4 or claims for costs against the Debtor arising from the litigation, with the enforcement of and such  
5 monetary claims to remain stayed as to the Debtor pending further order of this court;  
6       2) Waiving the effect of FRBP 4001(a)(3); and  
7       3) For such other and further relief as the Court deems proper.

8

9 DATED: June 29, 2023

FENNEMORE WENDEL

10

11 By: /s/ Lisa Lenherr

12       Mark S. Bostick

13       Lisa Lenherr

14       Attorneys for Creditors Margot Schwartz,  
Noah Schwartz and the Schwartz Foundation